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OCT 27 2003

Department of Water Resources

DANIEL V. STEENSON (ISB #4332)
CHARLES L. HONSINGER (ISB #5240)
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RINGERT CLARK CHARTERED
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Attorneys for Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

_____)
IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-) PETITION CONTESTING OCTOBER 10,
02659, 36-02680, 36-04032A, 36-04032B, 36-) 2003 ORDER
04032C, 36-040032D, 36-07004, 36-07080, 36-)
07167, 36-07176, 36-07725, 36-07731, AND)
36-08089)
_____)

COMES NOW, Petitioners, Clear Lakes Trout Company, Inc. ("Clear Lakes"), Fisheries Development Company, Inc. ("Fisheries Development"), Rim View Trout Company, Inc. ("Rim View"), and Estate of Earl M. Hardy ("Hardy Estate"), (hereinafter collectively referred to as "Petitioners") by and through their attorneys, Ringert Clark, Chartered, and file this petition contesting the October 10, 2003 Order issued by the Director of the Idaho Department of Water Resources ("IDWR") in the above referenced matter.

INTRODUCTION: PENDING DISTRICT COURT LITIGATION

In May, 2003, Petitioners each submitted to the Director of IDWR written demands for delivery of water. By the end of September of 2003, the Director had not issued a decision in response to those demands. On September 29, 2003, Rim View and the Hardy Estate filed a

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complaint with the District Court in Ada County against the Director and IDWR seeking a writ of mandate to compel IDWR to distribute water to their senior water rights as required by Idaho Code § 42-602 *et seq.*, and an order invalidating the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11 of the Administrative Rules of the Department of Water Resources (hereinafter “Conjunctive Management Rules”) and their proposed application to Rim View’s and the Hardy Estate’s demands for delivery of water. The District Court action is Case No. CV OC 0307551D. On October 10, 2003, the Director issued an Order denying Petitioners’ demands for delivery of water. On October 21, 2003, Rim View and the Hardy Estate filed an Amended Verified Complaint and Petition for Writ of Mandate (“Amended Complaint”) to address additional issues raised by the Director’s October 10, 2003 Order. A copy of the Amended Complaint is attached hereto as Attachment A, and incorporated herein by this reference.

This petition is filed to preserve each Petitioner’s right to a hearing before the Director on any issues that are not resolved by the District Court litigation. The issues that Rim View and the Hardy Estate have identified at this time are presented by the Amended Complaint. Rim View and the Hardy Estate reserve the right to further amend the Amended Complaint or this petition as necessary to address additional issues.

The Director’s October 10, 2003 Order denies the demands submitted by Clear Lakes and Fisheries Development on the grounds that Clear Lakes (the owner of the water rights for both companies) is a party to the Interim Stipulated Agreement For Areas Within and Near IDWR Administrative Basin 36 (“Interim Stipulated Agreement”), and is precluded from demanding delivery of water “until after the Stipulated Agreement expires on December 21, 2003.” However, neither Clear Lakes nor Fisheries Development is bound by the terms of the Interim Stipulated Agreement

because the Agreement has been breached and the Director has failed and refused to enforce the Agreement as written. Therefore, in addition to all other issues presented by this petition, Clear Lakes and Fisheries Development hereby contest the Director's determination that they are not entitled to demand delivery of water until after the Interim Stipulated Agreement expires. Clear Lakes and Fisheries Development anticipate that these additional issues may be joined in the District Court litigation.

Administrative proceedings on this petition should be stayed until the District Court enters its decision addressing the issues presented by the Amended Complaint.

REQUESTED RELIEF

By this petition, Petitioners seek rescission of the Director's October 10, 2003 Order, and implementation of administration to supply Petitioners' water rights.

FACTS

Petitioners own water rights which entitle them to use water for fish propagation purposes in Gooding County, Idaho. Clear Lakes owns water right nos. 36-02659 and 36-07004 for use by the Clear Lakes fish rearing facility. Clear Lakes owns right nos. 36-07080, 36-07725 and 36-07731 for use by the Fisheries Development fish rearing facility. Rim View owns water right nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680 and 36-07167 for use in its fish rearing facility. The Hardy Estate owns water right no. 36-07176 for use in its White Springs fish rearing facility.

The water sources for Petitioners' water rights are springs that are part of the spring complex commonly known as the "Thousand Springs," which is supplied by the Eastern Snake River Plain Aquifer (ESPA). The springs are tributary to the Snake River and are hydrologically interconnected

to the ESPA. Junior groundwater diversions from the aquifer reduce the quantity of water available to Plaintiffs when Plaintiffs need and have the right to said water. These spring sources for Petitioners' water rights are located within Water District 130, which is presently being administered by IDWR through watermaster, Cindy Yenter.

Petitioners do not receive and have not been receiving, their full entitlement to water pursuant to their water rights, depriving them of a sufficient water supply for their fish propagation facilities. On May 15, 2003, and May 16, 2003, Petitioners made written demands for the delivery of water upon the Director.

The October 10, 2003 Order treats Petitioners' demands for the delivery of water as "calls for water delivery" under the Conjunctive Management Rules. Based in part on the Director's application and interpretation of the Conjunctive Management Rules, the October 10, 2003 Order directs the watermasters for Water Districts No. 36A and No. 130 "to continue administering water rights within Water Districts No. 36A and No. 130, under the supervision of the Director, in the same manner that the rights are presently being administered." The October 10, 2003 Order constitutes a denial of Petitioners' demands for the delivery of water.

The October 10, 2003 Order denies the demands submitted by Clear Lakes and Fisheries Development because Clear Lakes (owner of the water rights for both companies) is a party to the Interim Stipulated Agreement and, under the Agreement, may not demand delivery of water "until after the Stipulated Agreement expires on December 31, 2003."

The October 10, 2003 Order denies Rim View's demand for delivery of water on the grounds that reductions in the supply of water available to Rim View are "due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority

rights,” and on the grounds that there is currently “adequate water available to fill” Rim View’s water right no. 36-07167.

The October 10, 2003 Order denies the Hardy Estate’s demand for delivery of water on the grounds that the Interim Stipulated Agreement is “‘an approved and effectively operating mitigation plan’ under Rule 42.02 of the Conjunctive Management Rules.”

The Director’s denial of the Hardy Estate’s demand for delivery of water is also based on the application of “quantity” and “time” “criteria” he allegedly “specified” prior to the October 10, 2003 Order. Neither of these criteria is specified in any laws of the State of Idaho or in any rule promulgated by any agency of the State. Under these criteria, ground water diversions are subject to curtailment to supply senior spring water rights only if 50 percent of the water diverted by the junior ground water rights would reach the springs within 6 months. The Director and IDWR determined through use of a computer model that 40,000 acre feet of water would reach the Thousand Springs by curtailing junior ground water rights that meet these criteria. The Director and IDWR concluded that providing this amount of water is “adequate” to mitigate for the injuries ESPA ground water diversions are causing to spring water right holders.

BASIS FOR PETITION

The Director’s October 10, 2003 Order in the above-captioned matter states that

any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of the order, or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing.

The grounds for this petition are that:

1. The Conjunctive Management rules which have been applied to Petitioners’ demands for

delivery of water are contrary to law and unconstitutional on their face, and as applied to Petitioners' demands.

2. The Director's conclusions that reductions in the supply of water available to Rim View are "due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority rights," and that there is currently "adequate water available to fill" Rim View's water right no. 36-07167 are erroneous.
3. The Director's conclusion that the Interim Stipulated Agreement is "'an approved and effectively operating mitigation plan' under Rule 42.02 of the Conjunctive Management Rules" which preclude the Hardy Estate's demand for delivery of water is erroneous.
4. The Director's conclusion that the Interim Stipulated Agreement precludes Clear Lakes and Fisheries Development from demanding delivery of water until the Agreement expires is erroneous.
5. The Director's conclusion that the amount of water currently being provided as mitigation is "adequate" to mitigate for the injuries of ESPA ground water diversions to spring water right holders is erroneous.
6. The Director's "criteria" constitute "rules" under the Idaho Administrative Procedures Act (IAPA), I.C. §§67-5201 *et. seq.*, that are void because they were not promulgated in compliance with the requirements of the IAPA, and because they arbitrarily limit the water supply and the groundwater rights that are subject to the priorities of water rights to the Thousand Springs, including Petitioners' water rights.
7. The Director's quantity and time "criteria" and the application thereof to deny Petitioners' demands for delivery of water diminish and deprive Petitioners of the priority and water

supply of their water rights, and are therefore void as an unconstitutional taking of Petitioners' water rights.

AUTHORITIES FOR THIS PETITION

This petition is filed pursuant to the following:

1. The instructions in the Director's October 10, 2003 Order;
2. Idaho Code, Title 42, Chapter 6, and the Director's February 19, 2002 Final Order Creating Water District 130, under which IDWR has ongoing responsibility to administer water rights in Water District 130.
3. I.C. § 42-1701A(3); and
4. IDAPA 37.01.01.104, which provides that a formal proceeding must be initiated by a pleading listed in IDWR Rules 210-280.

HEARINGS AND SCHEDULING

Petitioners request that the Director hold this Petition in abeyance pending a decision by the District Court on the issues presented by the Amended Complaint.

Dated this 28 th day of October, 2003.

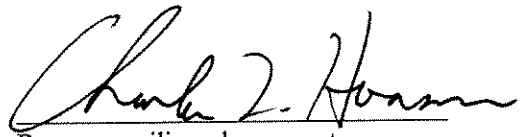
RINGERT CLARK, CHARTERED

By: Charles L. Honsinger
Charles L. Honsinger
Ringert Clark Chartered
Attorneys for Petitioner

CERTIFICATE OF MAILING

I certify that on October 28, 2003, I served the original and copies of this document, including all attachments to the following:

Jeffrey C. Fereday
Michael C. Creamer
Deborah E. Nelson
Given Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720


Person mailing documents

ATTACHMENT A

OCT 21 2003

J. DAVID N. ... Clerk
BY ...
10/21/03

DANIEL V. STEENSON (ISB#4332)
CHARLES L. HONSINGER (ISB #5240)
S. BRYCE FARRIS (ISB#5636)
RINGERT CLARK CHARTERED
P.O. Box 2773
Boise, ID 83702
(208)342-4591

Attorneys for Petitioners/Plaintiffs

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RIM VIEW TROUT COMPANY;)	CASE NO.: CV OC 0307551D
and THE ESTATE OF EARL M.)	
HARDY,)	AMENDED VERIFIED COMPLAINT AND
)	PETITION FOR WRIT OF MANDATE
Petitioners/Plaintiffs,)	
)	
vs.)	
)	
KARL J. DREHER, in his official)	
capacity as Director of the Idaho)	
Department of Water Resources,)	
and the IDAHO DEPARTMENT)	
OF WATER RESOURCES,)	
)	
Respondents/Defendants.)	
)	

COME NOW the Petitioners/Plaintiffs, Rim View Trout Company and the Estate of Earl M. Hardy (hereinafter collectively referred to as "Plaintiffs"), by and through their undersigned attorneys of record, Ringert Clark Chartered, and hereby file this Amended Complaint and Petition in the above-entitled Court. Petitioners/Plaintiffs complain, allege and petition as follows:

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GENERAL ALLEGATIONS

I.

Plaintiff, Rim View Trout Company (“Rim View”), is an Idaho corporation, with its principal office in Boise, Ada County, Idaho. Plaintiff, the Estate of Earl M. Hardy (“Hardy Estate”), Anita Kay Hardy, Personal Representative, is the legal successor to Earl M. Hardy, deceased, with its principal offices in Boise, Ada County, Idaho.

II.

Defendant Karl J. Dreher is a resident of Ada County, Idaho, and is the Director of the Defendant Idaho Department of Water Resources (“IDWR”), with its main offices located at 1301 N. Orchard Street, Boise, Ada County, Idaho.

III.

Plaintiffs own water rights which entitle them to use water for fish propagation purposes in Gooding County, Idaho. Rim View is the owner of the following water right: 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680 and 36-07167. The Hardy Estate is the owner of water right 36-07176. True and accurate copies of the partial decrees for the above-mentioned water rights, along with the water right report for 36-07176, are attached hereto as Exhibit A.

IV.

The spring sources of Plaintiffs’ water rights are located within Water District 130, said Water District having been created pursuant to Idaho Code § 42-604 on or about February 19, 2002. Water District 130 is presently being administered by the Defendant IDWR through watermaster Cindy Yenter.

V.

Pursuant to Idaho Code § 42-602, et seq., it is the duty of Defendant Dreher, as Director of the Defendant IDWR, to direct and control the distribution of water from all natural water sources within a water district according to the prior appropriation doctrine. Pursuant to Idaho Code § 42-607, it is Defendants' duty through their watermaster to distribute the waters within Water District 130 according to the prior rights of water users within the Water District so that in times of scarcity of water, the diversion facilities for junior water rights are shut off or otherwise controlled as necessary to supply water for the prior rights of senior water right holders, including the water rights of Plaintiffs.

VI.

The water sources for Plaintiffs' water rights are springs that are part of the spring complex commonly known as the "Thousand Springs," which are supplied by the Eastern Snake River Plain Aquifer (ESPA). The springs are tributary to the Snake River and are hydrologically interconnected to the ESPA. Junior groundwater diversions from the aquifer reduce the quantity of water available to Plaintiffs when Plaintiffs need and have the right to said water.

VII.

During all or portions of the periods of use for their water rights (January 1 to December 31), Plaintiffs do not receive and have not been receiving, their full entitlement to water pursuant to their water rights, depriving them of a sufficient water supply for their fish propagation facilities, all to the proximate detriment of Plaintiffs.

VIII.

Both before and after the formation of Water District 130, Defendants have been aware of the fact that the springs which supply Plaintiffs' water rights have not provided sufficient water to supply Plaintiffs' water rights. Defendants have failed to perform their statutory duties to administer the distribution of water within Water District 130 according to the prior appropriation doctrine so as to shut off or control the diversion of junior water rights to supply Plaintiffs' water rights.

IX.

On May 15, 2003, Plaintiffs made written demands for delivery of water upon Defendant Dreher. True and accurate copies of said letters are attached hereto as Exhibit B.

X.

Defendant Dreher advised Plaintiffs that their demands would be treated as "calls for water delivery" under the Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37, Title 03, Chapter 11 of the Administrative Rules of the Department of Water Resources (hereinafter "Conjunctive Management Rules"). True and accurate copies of the correspondence in which Defendant Dreher advised Plaintiffs that their demands would be treated as "calls for water delivery" are attached hereto as Exhibit C.

XI.

The Conjunctive Management Rules have not been applied to numerous demands for the delivery of water by water users other than the Plaintiffs, in Water District 130 and in other water districts throughout the state.

XII.

In an August 15, 2003 letter, Defendant Dreher stated that he would respond to Plaintiffs' demands for the delivery of water by the end of August. A true and accurate copy of said letter is attached hereto as Exhibit D. On August 20, 2003, Defendant Dreher verbally reiterated to representatives of Plaintiffs and other spring water users that he would respond by the end of August. No response was provided by the end of August. On September 12, 2003, Plaintiffs' attorney sent a letter requesting that Defendants respond to their demands for the delivery of water. A true and accurate copy of said letter is attached hereto as Exhibit E. On September 16, 2003, four months after Plaintiffs' demands for the delivery of water, Defendant Dreher sent a letter to Plaintiffs' attorney stating that he was still unable to respond to Plaintiffs' demands for the delivery of water. A true and accurate copy of said letter is attached hereto as Exhibit F.

XIII.

After Plaintiffs filed the original Complaint on September 29, 2003, and served Defendants with a copy thereof on September 30, 2003, Defendant Dreher issued his October 10, 2003 Order addressing Plaintiffs' demands for the delivery of water. A true and accurate copy of the October 10, 2003 Order is attached hereto as Exhibit G. The October 10, 2003 Order treats Plaintiffs' demands for the delivery of water as "delivery calls" under the Conjunctive Management Rules. The October 10, 2003 Order directs the watermasters for Water Districts No. 36A and No. 130 "to continue administering water rights within Water Districts No. 36A and No. 130, under the supervision of the Director, in the same manner that the rights are presently being administered." The October 10, 2003 Order constitutes a denial of Plaintiffs' demands for the delivery of water.

XIV.

Defendant Dreher's October 10, 2003 Order denies Rim View's demand for delivery of water on the grounds that reductions in the supply of water available to Rim View are "due to seasonal variations in spring discharge that have not been attributed to ground water diversions and use under junior priority rights," and on the grounds that there is "adequate water available to fill" Rim View's water right no. 36-07167. Both conclusions are erroneous.

XV.

Defendant Dreher's October 10, 2003 Order denies the Hardy Estate's demand for delivery of water on the grounds that there is "'an approved and effectively operating mitigation plan' under Rule 42.02 of the Conjunctive Management Rules." This conclusion is erroneous.

XVI.

Defendant Dreher's denial of the Hardy Estate's demand for delivery of water is also based on the application of "quantity" and "time" "criteria" he allegedly "specified" prior to the October 10, 2003 Order. Exhibit G, Findings of Fact ¶ 90. Neither of these criteria is specified in any laws of the State of Idaho or in any rule promulgated by any agency of the State. Under Defendant Dreher's criteria, ground water diversions are subject to curtailment to supply senior spring water rights only if 50 percent of the water diverted by the junior ground water rights would reach the springs within 6 months. Defendants determined through use of a computer model that 40,000 acre feet of water would reach the Thousand Springs by curtailing junior ground water rights that meet these criteria. Defendants concluded that providing this amount of water is "adequate" to mitigate the injuries ESPA ground water diversions are causing to senior spring water rights.

COUNT ONE (WRIT OF MANDATE)

XVII.

Plaintiffs repeat and reallege the allegations set forth in I - XVI of Plaintiffs' Amended Verified Complaint and Petition for Writ of Mandate.

XVIII.

As a direct and proximate result of Defendants' failure and refusal to administer water rights according to Defendants' statutory duties to supply the prior water rights of Plaintiffs herein during times of water scarcity, Plaintiffs have been damaged, and presently continue to be damaged, in that they are unable to use all of their fish propagation facilities, and those fish propagation facilities that are presently being used have been damaged and continue to be damaged on a daily basis in that Plaintiffs have inadequate water pursuant to their senior water rights. As a direct and proximate result of Defendants' failure and refusal to fulfill their statutory duties and responsibilities pursuant to Idaho Code § 42-602, et seq., Plaintiffs are being irreparably damaged, and have no plain, adequate nor speedy remedy at law.

XIX.

Defendants' failure and refusal to perform their statutory duties of controlling the distribution of water within Water District 130 to distribute water to Plaintiffs' prior rights deprives Plaintiffs of the use and enjoyment of their properties and is causing Plaintiffs irreparable harm, which damage can only be remedied by an order of this Court compelling Defendants to perform their statutory duties pursuant to Idaho Code § 42-602, et seq., thereby enabling Plaintiffs to use and enjoy their senior water rights and the properties to which those rights are appurtenant.

XX.

Defendants' failure and refusal to distribute water to Plaintiffs' prior rights, and Defendants' application of the Conjunctive Management Rules, violates, interferes with and impairs the constitutionally-protected priorities of Plaintiffs' water rights, Plaintiffs' constitutional rights to equal protection of the law, and is contrary to the public policies of this state. If the Defendants' actions and/or inactions are allowed to stand, the constitutional rights of other water users of this state will be threatened and diminished.

XXI.

Defendant Dreher's "criteria" reduce the water supply and limit the number of groundwater rights that are subject to the priorities of senior water rights to the Thousand Springs, including Plaintiffs' water rights. These criteria constitute "rules" under the Idaho Administrative Procedures Act (IAPA), I.C. §§67-5201 *et. seq.*, that are void because they were not promulgated in compliance with the requirements of the IAPA.

XXII.

Defendant Dreher's criteria are contrary to law and violate, interfere with, dismiss and impair the constitutionally-protected priorities of Plaintiffs' water rights, Plaintiffs' constitutional rights to equal protection of the law, and are contrary to the public policies of this state. If the Defendants' actions and/or inactions are allowed to stand, the constitutional rights of other water users of this state will be threatened and diminished.

XXIII.

Plaintiffs' are entitled to issuance of a writ of mandate pursuant to Idaho Code § 7-302 in order to compel Defendants to perform their duties under Idaho Code §42-602 *et seq.* to distribute

the waters within Water District 130 to supply Plaintiffs' prior rights, and in order to prevent Defendants from using Defendant Dreher's quantity and time criteria to reduce the water supply and limit the number of groundwater rights that are subject to the priorities of senior water rights to the Thousand Springs, including Plaintiffs' water rights, or to determine that there is "an effectively operating mitigation plan" which supplants Defendants' performance of their duties.

COUNT TWO (DECLARATORY JUDGMENT)

XXIV.

Plaintiffs repeat and reallege the allegations set forth in I - XXIII of Plaintiffs' Amended Verified Complaint and Petition for Writ of Mandate.

XXV.

Defendant IDWR promulgated and adopted administrative rules entitled "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37.03.11, on or about October 7, 1994. A petition for review of or action for declaratory relief from said Conjunctive Management Rules may be filed at any time pursuant to Idaho Code § 67-5273 and/or Idaho Code § 67-5278.

XXVI.

The Conjunctive Management Rules require Plaintiffs and other similarly-situated senior surface water right holders to submit a "call" and initiate administrative procedures prior to the distribution and delivery according to Plaintiffs' prior rights. This process results in unreasonable delay in the distribution of water to senior water rights, including Plaintiffs' water rights, and is contrary to Plaintiffs' rights, Idaho law, the prior appropriation doctrine, and Idaho Code § 42-602 *et seq.*

XXVII.

The Conjunctive Management Rules contain “factors” which impose burdens on senior water rights. These “factors” include, but are not limited to, a showing of material injury, reasonableness of the senior water right diversion, and that the senior right could not be met using alternate points and/or means of diversion. The application of these “factors” results in unreasonable delay in the distribution of water to senior water rights, including Plaintiffs’ water rights, and imposes burdens which are contrary to Plaintiffs’ water rights and constitutional rights, Idaho law, the prior appropriation doctrine and Idaho Code § 42-602 *et seq.*

XXIII.

Defendant Dreher’s application of the standards and procedures of the Conjunctive Management Rules to Plaintiffs’ demands for delivery of water resulted in an five-month delay in responding to Plaintiffs’ demands. Defendant Dreher’s October 10, 2003 Order recited and applied “factors” or concepts from the Conjunctive Management Rules in denying Plaintiffs’ demands for delivery of water. If Defendants’ application of the Conjunctive Management Rules when administering the distribution and delivery of senior water rights is allowed to stand, the rights of Plaintiffs and other water users of this state will be threatened and diminished.

XXIX.

Defendants determined that a private agreement to which neither the Hardy Estate nor Rim View was a party constitutes an “approved and effectively operating mitigation plan” under the Conjunctive Management Rules, thereby negating Plaintiffs’ water right priorities and demand for delivery of water. A determination that a “mitigation plan” supplants administration of water rights is contrary to the Plaintiffs’ rights, Idaho law, the prior appropriation doctrine and Idaho Code § 42-

602 *et seq.* If Defendants' determination that a "mitigation plan" supplants administration of the distribution and delivery of senior water rights is allowed to stand, Plaintiffs' rights and other water users of this state will be threatened and diminished.

XXX.

Prior to their application of the Conjunctive Management Rules to Plaintiffs, Defendants have not applied the Conjunctive Management Rules to the administration and delivery of water rights in Water District 130 and other Water Districts. Defendants' application of the Conjunctive Management Rules to Plaintiffs, and their delay in distributing water to Plaintiffs, constitute unequal and inconsistent treatment of Plaintiffs in violation of the Equal Protection Clauses of the Federal and State Constitutions.

XXXI.

Plaintiffs are entitled to an order from this Court declaring that Defendants' application of the Conjunctive Management Rules is unconstitutional, contrary to law, and violates the Plaintiffs' rights and the Defendants' duties under the prior appropriation doctrine and Idaho Code § 42-602 *et seq.* Plaintiffs are also entitled to an order declaring that Defendant Dreher's "criteria" are unconstitutional, contrary to law, violate Plaintiffs' rights and the Defendants' duties, and are otherwise void because they are rules that were not promulgated as required by the IAPA.

COUNT THREE (TAKING)

XXXII.

Plaintiffs repeat and reallege the allegations set forth in I - XXXI of Plaintiffs' Amended Verified Complaint and Petition for Writ of Mandate.

XXXIII.

Defendant Dreher's quantity and time "criteria" and the application thereof to deny Plaintiffs' demands for delivery of water arbitrarily reduce the water supply and limit the number of junior water rights to which Plaintiffs' senior water rights apply.

XXXIV.

Defendant Dreher's quantity and time "criteria" and the application thereof to deny Plaintiffs' demands for delivery of water diminish and deprive Plaintiffs of the priority and the water supply of their water rights, and are therefore void as an unconstitutional taking of Plaintiffs' water rights.

XXXV.

In the event that Defendant Dreher's criteria are affirmed, Plaintiffs are entitled to just compensation pursuant to the constitutions of the State of Idaho and the United States.

REQUEST FOR ATTORNEY FEES

XXXVI.

As a direct and proximate result of the Defendants' failure and refusal and continued failure and refusal to perform their statutory duties and their failure and refusal to distribute water during times of scarcity to senior water rights holders, including Plaintiffs herein, Plaintiffs have been required to employ the services of the law firm of Ringert Clark Chartered, and have also incurred various costs and will in the future continue to incur various future court costs and attorney fees. Therefore, under Idaho law, including, but not limited to Idaho Code §§ 12-117 and 12-121 and the Private Attorney General Doctrine, the Defendants should be required to pay to Plaintiffs their reasonable costs and attorney fees.

WHEREFORE, Plaintiffs pray for the issuance of a writ of mandate and/or order of the court directed to the Defendants ordering as follows:

(1) a writ and/or order compelling Defendants to distribute water to Plaintiffs' senior water rights as required by Idaho Code § 42-602 et seq.;

(2) an order declaring that the procedures and requirements of the Conjunctive Management Rules are void on their face because they are unconstitutional, contrary to law, and violate Plaintiffs' water rights and constitutional rights and Defendants' duties;

(3) an order declaring that Defendants' application of the Conjunctive Management Rules to Plaintiffs' demands for delivery of water is unconstitutional, contrary to law, and violates the Plaintiffs' water rights and constitutional rights and the Defendants' duties;


(4) an order declaring that Director Dreher's "criteria" are unconstitutional, contrary to law, violate Plaintiff's water rights and constitutional rights and the Defendant's duties, and are otherwise void because they are rules that were not promulgated as required by the IAPA.

(5) in the event that Defendant Dreher's "criteria" are affirmed, Plaintiffs are entitled to just compensation in an amount to be determined at trial.

(6) for such other relief as to the court shall seem just and equitable in the premises.

DATED this 20th day of October, 2003.

RINGERT CLARK CHARTERED

By: 
Daniel V. Steenson
Attorneys for Petitioners/Plaintiffs

STATE OF IDAHO)
) ss VERIFICATION
COUNTY OF Ada)

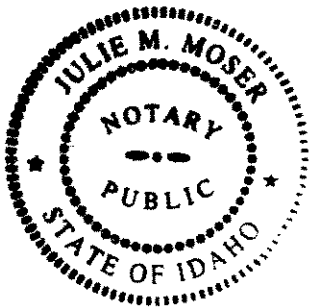
Kay Hardy, after being first duly sworn on oath depose and state as follows:

1. That I am the President of Rim View Trout Company, the Petitioner/Plaintiff in the above-entitled action, and I have reviewed the Amended Verified Complaint and Petition for Writ of Mandate and I believe the facts contained therein to be true and correct to the best of my knowledge.

Kay Hardy
Kay Hardy

SUBSCRIBED AND SWORN TO before me this 27th day of October, 2003.

Julie M. Moser
Notary Public for Idaho
Residing Boise, ID
My Commission Expires: 9/16/08



STATE OF IDAHO)
) ss
COUNTY OF Ada)

VERIFICATION

Kay Hardy, after being first duly sworn on oath depose and state as follows:

1. That I am the Personal Representative of the Estate of Earl M. Hardy, the Petitioner/Plaintiff in the above-entitled action, and I have reviewed the Verified Complaint and Petition for Writ of Mandate and I believe the facts contained therein to be true and correct to the best of my knowledge.

Kay Hardy
Kay Hardy

SUBSCRIBED AND SWORN TO before me this 25th day of October, 2003.

Julie M. Moser
Notary Public for Idaho
Residing Boise, ID
My Commission Expires: 9/16/08

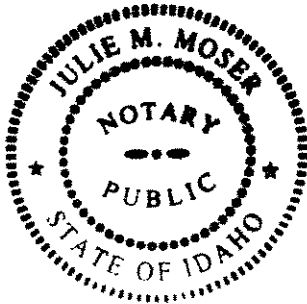


EXHIBIT A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO

FILED

2002 OCT 18 AM 10 49

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 19576)
)
) Water Right 36-04032A

NAME AND ADDRESS: RIM VIEW TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: NIAGARA SPRINGS TRIBUTARY: SNAKE RIVER

QUANTITY: 10.00 CFS
7239.80 AFY

PRIORITY DATE: 03/15/1912

POINT OF DIVERSION: T09S R15E S10 LOT 1 (SENE) Within Gooding County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Fish Propagation	01-01 TO 12-31	10 00 CFS 7239.80 AFY

PLACE OF USE: Fish Propagation Within Gooding County
T09S R15E S10 LOT 1 (NENE) LOT 2 (NWNE)
LOT 10 (SWNE) LOT 9 (SENE)

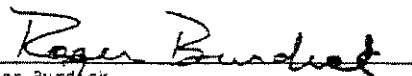
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

USE OF THIS WATER RIGHT SHALL BE SUBJECT TO THE TERMS AND
CONDITIONS OF THE "NIAGARA SPRINGS AGREEMENT," DATED SEPTEMBER
30, 1993, AND THE "AMENDMENT TO NIAGARA SPRINGS AGREEMENT,"
DATED JULY 24, 2002.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2002 OCT 18 AM 10 49

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
)
) Water Right 36-04032B

NAME AND ADDRESS: RIM VIEW TROUT
1101 VISTA AVENUE
BOISE, ID 83705

SOURCE: NIAGARA SPRINGS TRIBUTARY: SNAKE RIVER

QUANTITY: 10.00 CFS
7239.80 AFY

PRIORITY DATE: 04/01/1951

POINT OF DIVERSION: T09S R1E S10 LOT 1 (SENE) Within Gooding County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Domestic	01-01 TO 12-31	0.08 CFS
	Fish Propagation	02-01 TO 12-31	10.00 CFS
			7239.80 AFY

PLACE OF USE:	Fish Propagation		Within Gooding County
	T09S R1E S10 LOT 1 (NENE)	LOT 2 (NWNE)	
	LOT 10 (SWNE)	LOT 9 (SENE)	
	Domestic		Within Gooding County
	T09S R1E S10 LOT 1 (NENE)	LOT 9 (SENE)	

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

USE OF THIS WATER RIGHT SHALL BE SUBJECT TO THE TERMS AND CONDITIONS OF THE "NIAGARA SPRINGS AGREEMENT," DATED SEPTEMBER 30, 1993, AND THE "AMENDMENT TO NIAGARA SPRINGS AGREEMENT," DATED JULY 24, 2002.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

2002 OCT 18 AM 10 48

In Re SRBA)
Case No. 39576)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 36-04032C

NAME AND ADDRESS: RIM VIEW TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: NIAGARA SPRINGS
TRIBUTARY: SNAKE RIVER

QUANTITY: 5.00 CFS
3619.90 AFY

PRIORITY DATE: 04/01/1952

POINT OF DIVERSION: T09S R15E S10 LOT 1 (SENE) Within Gooding County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Fish Propagation	01-01 TO 12-31	5.00 CFS

PLACE OF USE: Fish Propagation
T09S R15E S10 LOT 1 (SENE) Within Gooding County
LOT 10 (SWNE) LOT 2 (NWNE)
LOT 9 (SENE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

USE OF THIS WATER RIGHT SHALL BE SUBJECT TO THE TERMS AND
CONDITIONS OF THE "NIAGARA SPRINGS AGREEMENT," DATED SEPTEMBER
30, 1993, AND THE "AMENDMENT TO NIAGARA SPRINGS AGREEMENT,"
DATED JULY 24, 2002.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

2002 OCT 18 AM 10 48

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 34-04032D

NAME AND ADDRESS: RIM VIEW TROUT
1301 VISTA AVE
BOISE, ID 83705

SOURCE: NIAGARA SPRINGS TRIBUTARY: SNAKE RIVER

QUANTITY: 15.00 CFS
10859.70 AFY

PRIORITY DATE: 12/31/1962

POINT OF DIVERSION: T09S R15E S10 LOT 1 (SENESE) Within Gooding County

PURPOSE AND
PERIOD OF USE: PURPOSE OF USE PERIOD OF USE QUANTITY
Fish Propagation 01-01 TO 12-31 15.00 CFS
10859.70 AFY

PLACE OF USE: Fish Propagation Within Gooding County
T09S R15E S10 LOT 1 (NENE) LOT 2 (NWNE)
LOT 10 (SWNE) LOT 9 (SENE)


OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

USE OF THIS WATER RIGHT SHALL BE SUBJECT TO THE TERMS AND
CONDITIONS OF THE "NIAGARA SPRINGS AGREEMENT," DATED SEPTEMBER
30, 1993, AND THE "AMENDMENT TO NIAGARA SPRINGS AGREEMENT,"
DATED JULY 24, 2002.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2002 OCT 18 AM 10 49

2002 OCT 18 AM 10 49

PAGE 1
Oct-18-2002

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2002 OCT 18 AM 10 48

In Re SRBA)
Case No. 39576)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 36-07167

NAME AND ADDRESS: RIM VIEW TROUT
1301 VISTA AVENUE
BOISE, ID 83705

SOURCE: NIAGARA SPRINGS TRIBUTARY: SNAKE RIVER

QUANTITY: 50.00 CFS
36198.90 AFY

PRIORITY DATE: 03/18/1971

POINT OF DIVERSION: T09S R15E S10 LOT 1 (SENESE) Within Gooding County

PURPOSE AND
PERIOD OF USE: PURPOSE OF USE PERIOD OF USE QUANTITY
Fish Propagation 01-01 TO 12-31 50.00 CFS
36198.90 AFY

PLACE OF USE: Fish Propagation Within Gooding County
T09S R15E S10 LOT 1 (SENESE) LOT 2 (NWNE)
LOT 10 (SWNE) LOT 9 (SENE)

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

USE OF THIS WATER RIGHT SHALL BE SUBJECT TO THE TERMS AND
CONDITIONS OF THE "NIAGARA SPRINGS AGREEMENT," DATED SEPTEMBER
30, 1993, AND THE "AMENDMENT TO NIAGARA SPRINGS AGREEMENT,"
DATED JULY 24, 2002.
RETURN FLOW SHALL BE TREATED TO INSURE THAT THE EFFLUENT MEETS
IDAHO WATER QUALITY STANDARDS.
A MEASURING DEVICE OF A TYPE APPROVED BY IDWR SHALL BE MAINTAINED
AS A PART OF THE DIVERTING WORKS.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

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with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

[Close](#)

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report

09/18/2003

WATER RIGHT NO. 36-7176

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	ESTATE OF EARL M HARDY C/O ANITA KAY HARDY 1301 S VISTA AVE BOISE, ID 83705 (208)342-0090
Original Owner	EARL M HARDY 1301 VISTA AVE BOISE, ID 83705 (208)326-5680

Priority Date: 05/18/1971

Basis: License

Status: Active

<u>Source</u>	<u>Tributary</u>
SPRINGS	SNAKE RIVER

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
FISH PROPAGATION	01/01	12/31	38.8 CFS	28400 AFA
Total Diversion			38.8 CFS	28400 AFA

Location of Point(s) of Diversion:

SPRINGS	SENW Lt 3	Sec. 02	Township 07S	Range 13E	GOODING County
SPRINGS	NESW Lt 6	Sec. 02	Township 07S	Range 13E	GOODING County

Place(s) of use:

Place of Use Legal Description: FISH PROPAGATION GOODING County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
07S	13E	2	3	SE NW										
			6	NESW										

Conditions of Approval:

1.	027	Use of water under this right shall be non-consumptive.
2.		The right holder shall not divert water at a rate exceeding what is reasonably necessary for the beneficial use authorized by this right.

Dates:

Licensed Date: 01/11/2002

Decreed Date:

Permit Proof Due Date: 3/1/1989

Permit Proof Made Date: 2/27/1989

Permit Approved Date: 3/22/1979

Permit Moratorium Expiration Date:

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Water Supply Bank Enrollment Date Accepted:

Water Supply Bank Enrollment Date Removed:

Application Received Date: 05/18/1971

Protest Deadline Date:

Number of Protests: 0

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Civil Case Number:

Old Case Number:

Decree Plaintiff:

Decree Defendant:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

DLE Act Number:

Cary Act Number:

Mitigation Plan: False

Close

EXHIBIT B

Karl Dreher
May 15, 2003
page 1

MAY 16 2003
Department of Water Resources

1301 Vista Avenue
Boise, Idaho 83705

May 15, 2003

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83706

Re: Delivery of Water Right Nos. 36-02680, 36-04032A, 36-04032B, 36-04032C,
36-04032D, and 36-07167

Dear Mr. Dreher:

Rim View Trout Company, Inc. ("Rim View") is entitled to divert an aggregate continuous flow of 150 cfs from Niagara Springs for fish propagation and domestic use pursuant to the following decreed water rights:

36-04032A	10 cfs	3/15/1912
36-04032B	10 cfs	1/4/1951
36-04032C	5 cfs	1/4/1952
36-04032D	15 cfs	1/12/1962
36-02680	60 cfs	6/6/1966
36-07167	50 cfs	3/18/1971

Under its water rights and the Niagara Springs Agreement, Rim View is entitled to "a total continuous flow of 150 cfs" from Niagara Springs. However, the persistence of the decline in Niagara Springs flows has prevented Rim View from diverting a continuous flow of 150 cfs at its headworks from October through April of each year, when IPC increases its diversions pursuant to the Niagara Springs Agreement. The shortage at Rim View's headworks ranges from 10 cfs during October to 60 cfs during March and April. This shortage forces Rim View to idle significant portions

Karl Dreher
May 15, 2003
page 2

of the hatchery, resulting in a decline in rearing capacity of approximately 40%.

Rim View hereby demands that you direct the Watermaster for Water District 130 to administer water rights in the Water District that deplete the supply of water to Niagara Springs as required by Idaho Code § 42-607 in order to supply Rim View's prior rights.

Sincerely,

Kay Hardy, President

Kay Hardy
President, Rim View Trout Company

1301 Vista Avenue
Boise, Idaho 83705

RECEIVED

MAY 16 2003

Department of Water Resources

May 15, 2003

BY HAND DELIVERY

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83706

Re: Delivery of Water to Water Right No. 36-07176

Dear Mr. Dreher:

Water right no. 36-07176 is entitled to delivery of 38.8 cfs from springs for fish propagation under a priority date of 5/18/71. Today the facility that utilizes this water right is receiving only 29.9 cfs from the spring source.

Demand is hereby made that you direct the Watermaster for Water District 130 to administer water rights in the Water District as required by Idaho Code § 42-607 in order to supply this prior right.

Sincerely,

Kay Hardy, General Partner
Kay Hardy, Personal Representative

Kay Hardy,
General Partner, Hardy Properties, LP
Personal Representative, Estate of Earl M. Hardy

EXHIBIT C

**State of Idaho****DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

May 19, 2003

Kay Hardy
President
Clear Lakes Trout Company
1301 Vista Avenue
Boise, ID 83705

VIA FACSIMILE TO (208) 342-4252 AND FIRST CLASS MAIL

Re: Delivery of Water to Water Rights Nos. 36-02659 and 36-07004;
36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, and 36-07167;
36-07080, 36-07725, 36-07731, and 36-08089; and 36-07176

Dear Ms. Hardy:

I have reviewed your hand-delivered letter dated May 14, 2003, demanding that I direct the Watermaster for Water District No. 130 to: (1) administer water rights in the Water District as required by Idaho Code § 42-607 to supply the prior rights of Clear Lakes Trout Company ("Clear Lakes"); (2) adjust the weir in the Western Diversion Pool shared with Clear Springs Foods ("Clear Springs") to deliver a minimum of 66 cfs to Clear Lakes' water right no. 36-02659; and adjust all other water diversions within Water District No. 130 as necessary to supply water right nos. 36-02659 and 36-07004. You state that you are making this demand because: "it is clear at this point that IDWR has no intention of enforcing the Agreement [*Interim Stipulated Agreement for Areas Within and Near Basin 36*], and that additional administrative action is contemplated that will further eviscerate the priority and beneficial use of Clear Lakes' water rights." You further state that: "In the absence of IDWR enforcement of the Interim Stipulated Agreement, it is necessary for Clear Lakes to take action to protect its water rights and its operations."

I have also reviewed the three hand-delivered letters you sent me dated May 15, 2003, demanding that I also direct the Watermaster for Water District 130 to administer water rights in the Water District pursuant to Idaho Code § 42-607 to supply water to prior rights held by Rim View Trout Company, Clear Lakes Trout Company and Fisheries Development Company, and the Estate of Earl M. Hardy, respectively.

Kay Hardy
May 19, 2003
Page 2 of 3

In your May 14 letter, you did not describe what factual basis led you to the conclusion that "IDWR has no intention of enforcing the [Stipulated] Agreement." I assure you that this conclusion is incorrect. Under my direction in 2002, IDWR enforced the Stipulated Agreement, as approved by "Order Approving Stipulated Agreements" dated January 18, 2002, and will continue such enforcement through December 31, 2003. Although IDWR is still finalizing its audit of replacement water and reductions in ground water withdrawals for 2002, we have determined that the North Snake and Magic Valley Ground Water Districts collectively fulfilled their obligations under the Stipulated Agreement for 2002. For 2003, the ground water districts intend to provide the full amount of replacement water called for in the Stipulated Agreement and do not plan on any reductions in ground water withdrawals. However, in the event the full amount of replacement water is not provided in 2003, reductions in ground water withdrawals will be enforced pursuant to the Stipulated Agreement. If the required replacement water or reductions in ground water withdrawals are not made, then your demand for water rights administration to provide water for Clear Lakes' water rights nos. 36-02659, 36-07004, 36-07080, 36-07725, and 36-07731 will be considered.

Regarding water right no. 36-08089, consistent with other rights for power generation the water right license for this right includes a condition that makes this right junior and subordinate to all rights for the use of water, other than for hydropower, that are later in priority. Therefore, your demand for water rights administration in Water District No. 130 to provide water for water right no. 36-08089 is denied.

Regarding water right nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, and 36-07167 ("Rim View rights"), the spring flow available for these rights from Niagara Springs, subject to the Niagara Springs Agreement, is allocated to the Rim View rights in order of priority. To the extent that more junior right(s) are not receiving the full quantity of water authorized under the right(s), your demand for water rights administration will be treated as a call for water delivery under the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) ("Conjunctive Management Rules") available at:

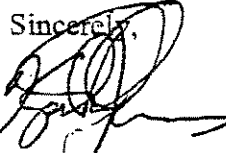
<http://www2.state.id.us/adm/adminrules/rules/idapa37/0311.pdf>

These rules prescribe how IDWR is to respond to a call for water delivery made by a holder of a senior priority surface or ground water right. Rule 40 of the Conjunctive Management Rules titled "Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights From Areas Having a Common Ground Water Supply in an Organized Water District" is particularly pertinent.

Similarly, your demand for water rights administration to provide water for water right no. 36-07176 will be treated as a call for water delivery under the Conjunctive Management Rules.

Kay Hardy
May 19, 2003
Page 3 of 3

In responding to your calls for water delivery, pursuant to the Conjunctive Management Rules I must first make findings that material injury is occurring and determinations of reasonableness of water diversions under the Rim View rights and right no. 36-07176, as provided in Rule 42 of the Conjunctive Management Rules. Since the Director of IDWR has not previously been required to apply Rule 42, I am now considering how best to proceed in making these determinations. I recognize the necessity of timely making these determinations and will contact you within the next several days after I have decided how best to proceed.

Sincerely,

Karl N. Dreher
Director

c: Cindy Yenter – Water District No. 130 Watermaster
North Snake Ground Water District
Magic Valley Ground Water District

**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

May 23, 2003

Kay Hardy
President
Rim View Trout Company
1301 Vista Avenue
Boise, ID 83705

VIA FACSIMILE TO (208) 342-4252 AND FIRST CLASS MAIL

Re: Delivery of Water to Water Rights Nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, 36-07167, and 36-07176

Dear Ms. Hardy:

In my letter to you earlier this week dated May 19, I notified you that your demands to administer water rights in Water District No. 130 to supply water to prior rights held by Rim View Trout Company (water rights nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, and 36-07167) and the Estate of Earl M. Hardy (water right no. 36-07176) would be treated as calls for water delivery under the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) ("Conjunctive Management Rules"), specifically Rule 40. I also notified you that pursuant to these rules, I am required to make findings that material injury is occurring and determinations of reasonableness of water diversions under the Rim View rights and right no. 36-07176, as provided in Rule 42.

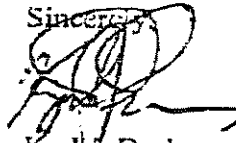
I have decided to initially make the findings required by Rules 40 and 42 without initiating a contested case at this time. Of course, either Rim View Trout Company or the Estate of Earl M. Hardy can petition IDWR to initiate a contested case if you would prefer to utilize that process, as provided by IDAPA 37.01.01.

I do not have sufficient information to make the findings required by Rules 40 and 42 of the Conjunctive Management Rules. Therefore, assuming you want me to proceed without initiating a contested case, I will need certain additional information as follows:

May Hardy
May 23, 2003
Page 2 of 2

- (1) The amount of water available to supply the listed water rights from the surface water sources from which the right is diverted;
- (2) The configuration of diversion works used to divert water under the listed water rights;
- (3) The amounts of water being diverted at the present time as well as the amounts of water historically diverted under the listed water rights;
- (4) The configuration of water measuring and recording devices used to measure the quantity of water diverted under the listed rights; and
- (5) The potential for supplying water to the listed rights by implementing alternate reasonable means of diversion or alternate points of diversion.

Developing the above information will require site visits by the watermaster for Water District No. 130 and at least one or two other employees of IDWR. Please have a representative of Rim View Trout Company and the Estate of Earl M. Hardy contact Cindy Yenter, the watermaster for Water District No. 130, as soon as possible to schedule site visits. In addition, please provide me with all historical records of the amounts of water diverted under the listed rights as soon as practicable.

Sincerely,

Karl J. Dreher
Director

c: Cindy Yenter – Water District No. 130 Watermaster
Brian Patton – IDWR
North Snake Ground Water District
Magic Valley Ground Water District

**State of Idaho****DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

July 2, 2003

Mr. Charles L. Honsinger
Ringert Clark, Chartered
455 South 3rd Street
P. O. Box 2773
Boise, ID 83701

VIA FACSIMILE TO (208) 342-4657 AND FIRST CLASS MAIL

Re: Delivery of Water to Water Rights Nos. 36-02659 and 36-07004;
36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, and 36-07167;
36-07080, 36-07725, 36-07731, and 36-08089; and 36-07176

Dear Mr. Honsinger:

In response to your letter dated June 25, 2003, I want to clarify that there is one "standard" applied by IDWR in responding to delivery calls or demands for administration of water rights to make water available to prior rights. The single standard applied in determining whether to reduce or curtail diversions of surface water or ground water under junior priority water rights to supply water to a senior priority right is summarized as follows:

- (1) Whether the holder of the senior priority water right has subordinated the priority of the right to the priorities of otherwise junior priority rights;
- (2) Whether the holder of the senior priority right is making reasonable use of the water available to supply the right and the use is authorized under the right;
- (3) Whether the senior priority water right is being deprived of water because of the exercise of junior priority rights;
- (4) Whether the depletion in the supply of water available to the senior priority right caused by the exercise of junior priority rights is being mitigated or is allowed pursuant to an approved stipulated agreement;

- (5) Whether water supplied to the senior priority right through the reduction or curtailment of water diversions under junior priority water rights would be beneficially used by the holder of the senior priority right; and
- (6) Whether the reduction or curtailment of water diversions under junior priority water rights would meaningfully increase the supply of water to the senior priority right within a time period within which the holder of the senior priority right could beneficially use the increased supply.

This is the standard that was applied in responding to the water delivery call made by Clear Springs Foods on June 7, 2002, against the water rights for Ms. Hardy's Clear Lakes fish production facilities. This is also the standard that is being applied in responding to the various delivery calls made by Ms. Hardy in mid-May.

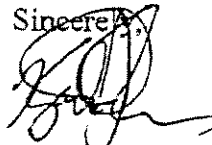
Although the standard is the same in determining whether to reduce or curtail diversions of surface water or ground water under junior priority water rights to supply water to a senior priority right, applying the standard in administering a delivery call against water rights from surface water sources and water rights from ground water sources are much different because the effects of ground water diversions on the ground water source, and on hydraulically-connected surface water sources are usually complex. Consequently, IDWR adopted the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37.03.11) ("Conjunctive Management Rules") for applying the standard summarized above when administering a call against water rights diverted from a ground water source. The Conjunctive Management Rules are consistent with the prior appropriation doctrine as implemented by Idaho law. In summary, the standard is the same for administering ground water rights as for water rights diverted from a surface water source, but the process pursuant to the Conjunctive Management Rules is different.

My staff and I have not identified any junior priority surface water rights in either Water District No. 130 or 36A that should be administered, beyond what already is occurring, to supply the prior rights of Ms. Hardy. However, we are investigating whether there are senior priority water rights from Billingsley Creek that have been partially subordinated to right no. 36-07725 through the Snake River Basin Adjudication. If you can identify water rights from Billingsley Creek that we have failed to recognize as being junior in priority to right no. 36-07725 or we identify rights that are partially subordinated to right no. 36-07725, then those rights will be curtailed in a manner consistent with the reduction of diversions under Clear Lakes' water right no. 36-07004 in response to the delivery call from Clear Springs, provided there is no mitigation or approved stipulation, to the extent curtailment would supply water that would be beneficially used under right no. 36-07725.

Mr. Charles L. Honsinger
July 2, 2003
Page 3 of 3

Unless surface water rights are identified that should be administered to supply water to right nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, 36-07167, or 36-07176, then consistent with my earlier letters to Ms. Hardy and Mr. Steenson, IDWR will continue to follow the procedures set forth in the Conjunctive Management Rules in responding to Ms. Hardy's demands for the administration of water rights in Water District No. 130.

Sincerely,



Karl J. Dreher
Director

c: Kay Hardy
Cindy Yenter – Water District No. 130 Watermaster
Alan Merritt – IDWR
Glen Saxton – IDWR

EXHIBIT D



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

August 15, 2003

Kay Hardy
President
Rim View Trout Company
1301 Vista Avenue
Boise, ID 83705

RECEIVED

AUG 18 2003

RINGERT CLARK

Re: Delivery of Water to Water Rights Nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, 36-07167, and 36-07176

Dear Ms. Hardy:

On May 19 and May 23, 2003, I wrote to you regarding how I intended to respond to your earlier letters demanding to have water rights in Water District No. 130 administered to supply water to prior rights held by Rim View Trout Company (water rights nos. 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-02680, and 36-07167) and the Estate of Earl M. Hardy (water right no. 36-07176). In my May 23 letter, I asked that you provide me with all historical records of the amounts of water diverted under these rights.

Although I have not received any records from you or your representatives, I am advising you that I am preparing an order making determinations as to whether material injury is occurring and the reasonableness of water diversions under the subject water rights. I am relying on information derived from the field investigations conducted by the watermaster for Water District No. 130 and other Department staff on May 30, 2003, as well as information developed by the Department or in the records of the Department. This includes diversion records compiled since 1995.

If you have other records or information you want to have considered, please provide it as soon as possible. I plan on issuing a final order by the end of this month.

Sincerely,

Karl J. Dreher
Director

c: Charles Honsinger – Ringert Clark
Cindy Yenter – Water District No. 130 Watermaster
North Snake Ground Water District
Magic Valley Ground Water District

EXHIBIT E

September 12, 2003

TRANSMITTED BY FACSIMILE

Karl Dreher
Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237
FAX: (208)327-7866

Re: Kay Hardy's Requests for Administration


Dear Mr. Dreher:

It has been four months since our client, Kay Hardy, submitted letters to you demanding administration to supply water rights for her various facilities. It is my understanding that you recently promised that you would issue a decision regarding Ms. Hardy's demands by the end of August. We have not seen that decision.

During the four months that our client's demands have been lain aside, administration which otherwise would have resulted in an additional supply of water to her facilities would certainly have benefitted her businesses. Yet, the administration necessary to benefit our client's facilities has not been implemented, despite the fact that you have implemented administration which injures her Clear Lakes facility.

Please either issue your promised decision immediately, or issue a satisfactory explanation for the delay.

Sincerely,


Charles L. Honsinger

cc: Kay Hardy

Laura E. Burn
Jeffrey R. Christenson
David P. Claiborne
D. Blair Clark
Michael J. Doolittle
S. Bryce Farris
David Hammerquist
Charles L. Honsinger
Joseph B. Jones
James P. Kauffman
Jennifer Reid Mahoney
James G. Reid
Daniel V. Steenson
Allyn L. Sweeney

William F. Ringert, of Counsel
Samuel Kauffman (1921-1986)

EXHIBIT F



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

September 16, 2003

Charles L. Honsinger
Ringert Clark, Chartered
455 South 3rd Street
P. O. Box 2773
Boise, ID 83701

VIA FACSIMILE TO (208) 342-4657 AND FIRST CLASS MAIL

RECEIVED

SEP 18 2003

Re: Kay Hardy's Requests for Administration

RINGERT CLARK

Dear Mr. Honsinger:

I have been out of town since last Wednesday, September 10, and did not receive your letter dated September 12 until today. Your characterization that I "promised" to issue a decision regarding Kay Hardy's demands for administration is incorrect. Attached is a copy of a letter to Ms. Hardy dated August 15, 2003, in which I stated my "plan" to issue a final order by the end of August. While I have been actively working on this order, various circumstances beyond my control have prevented my completion of the order as planned.

I realize that it has been four months since Ms. Hardy submitted her demands by various letters. I also recognize that this is of vital importance to Ms. Hardy. Consequently, I will issue an appropriate final order as soon as I can.

Sincerely,

Karl J. Dreher
Director

Attachment

c: Kay Hardy

EXHIBIT G

A complete copy of Exhibit G can be found on
IDWR's website at www.idwr.state.id.us

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

RECEIVED
OCT 13 2003
RINGERT CLARK

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHTS NOS. 36-02659,)
36-02680, 36-04032A, 36-04032B, 36-04032C,)
36-04032D, 36-07004, 36-07080, 36-07167,)
36-07176, 36-07725, 36-07731, AND 36-08089)
_____)

ORDER

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of four letters dated May 14 and May 15, 2003. The first letter, dated May 14, was from Kay Hardy, President of Clear Lakes Trout Company. The second letter, dated May 15, was from Kay Hardy, President of Fisheries Development Company. The third letter dated, May 15, was from Kay Hardy, President of Rim View Trout Company. The fourth letter, dated May 15, was from Kay Hardy, General Partner of Hardy Properties, LP and Personal Representative for the Estate of Earl M. Hardy (collectively referred to as "Hardy"). All four letters demand that the Director direct the watermaster for Water District No. 130, and the watermaster for Water District No. 36A in the letter from Fisheries Development Company, "to administer water rights in the Water District(s) ... as required by Idaho Code § 42-607" in order to supply the prior rights of Clear Lakes, Fisheries Development, Rim View, and Hardy. The Director enters the following Findings of Fact, Conclusions of Law, and Order in response to these four letters.

FINDINGS OF FACT

The Eastern Snake River Plain Aquifer and the Department's Ground Water Model

1. The Eastern Snake River Plain Aquifer ("ESPA") is defined as the aquifer underlying the Eastern Snake River Plain as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," USGS Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. (See IDAPA 37.03.11.050).
2. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and surface water sources tributary to the Snake River is in the Thousand Springs area located at the western edge of the ESPA east and southeast of Hagerman, Idaho.